CHE NAH HASHIM & ORS.

v.

PERBADANAN PEMBANGUNAN BANDAR (URBAN DEVELOPMENT AUTHORITY)

HIGH COURT MALAYA, PULAU PINANG
EDGAR JOSEPH JR J
[CIVIL SUIT NO. 22-67-87]
17 MARCH 1989

CIVIL PROCEDURE: *Interlocutory injunction - Application to discharge - Whether damages an adequate remedy - Whether in considering the balance of convenience the wider public interest may be taken into account - Non-disclosure of material facts at the time of the application for the interlocutory injunction - Whether injunction should be discharged.*

LIMITATION: *Whether action time barred.*

LAND LAW: *Acquisition of Land - Plaintiffs alleged that acquisition in contravention of Land Acquisition Act - Whether established.*

The plaintiffs applied for and obtained an *ex parte* interlocutory injunction restraining the defendant until further order from demolishing or causing to be demolished 6 houses of the plaintiffs standing on certain lands situated in Jalan Bagan Dalam, Butterworth. The defendant applied to discharge the interlocutory injunction.

The plaintiffs' action against the defendant was to challenge the acquisition by the defendant of the plaintiffs' property under the Perbandaran Bandar Act 1971 and consequently the power to demolish the plaintiffs' houses.

Held:

[1] The plaintiffs' action appeared to be barred by the provisions of s. 2 of the Limitation Act 1953 as the plaintiffs' cause of action arose on 13 October 1980 that being the date of publication in the Gazette of the proclamation of acquisition of the land and the plaintiffs did not issue their writ until 3 July 1987.

[2] Damages would afford the plaintiffs an adequate remedy in this case were the plaintiffs to succeed at the final hearing.

[3] The Court in considering the balance of convenience could and had in this case taken into account the wider public interest.

[4] It was trite law that when a plaintiff on an *ex parte* hearing has omitted, even as a result of a mere error of judgment, to make full disclosure of all material facts, the order granting an interlocutory injunction had to be discharged *inter partes* without investigation into its merits. On the facts of the case there had been material non-disclosure by the plaintiffs and accordingly the interlocutory injunction had to be discharged.

[Application to discharge granted. Enquiry into damages be held. Costs to follow event.]

Cases referred to:

Saw Seng Kee v. Director of Lands and Mines, Penang & Ors. [1987] 1 MLJ 80
American Cyanamid v. Ethicon [1975] AC 396 B & C
Smith & Ors. v. Inner London Education Authority [1978] 1 ALL ER 411
Rousse-Uclaf v. Seanlre & Co. [1977] ESR 125

Legislation referred to:
Land Acquisition Act 1960, ss. 11, 12, 14, 15, 16
Limitation Act 1953, s. 2
National Land Code 1965, s. 425(2)

For the plaintiffs - Shanmugam; M/s. Shan & Gooi
For the defendant - Nordin Sulaiman;M/s. Presgrave & Matthews

JUDGMENT

Edgar Joseph Jr J:

The defendant herein, the Urban Development Authority, had applied by summons-in-chambers supported by affidavit to discharge an *ex parte* interlocutory prohibitory injunction granted at the behest of the plaintiffs, whereby the defendant, its servants or agents had been restrained until further order from demolishing or causing to be demolished the six houses of the plaintiffs standing on certain land situated in Jalan Bagan Dalam, Butterworth, Province Wellesley ("the land") acquired by the defendant through the State Authority.

The application arises out of a suit instituted by the plaintiffs against the defendant wherein they seek to challenge the acquisition by the defendant of the land under the provisions of the Perbandaran Bandar Act 1971, and consequently, its power to demolish the plaintiffs' houses or to award compensation to the plaintiffs.

The material facts may be conveniently garnered from the affidavits filed and what I propose to do is to extract material portions therefrom.

It was alleged by Encik Othman bin Mohd Noor, the assistant area manager of the defendant in his affidavit affirmed to on 19 July 1987, and not challenged by the plaintiffs, that (1) the functions of the defendant are to implement and develop urban projects in line with the New Economic Policy of restructuring society with Bumiputra participation, (2) the implementation agent of the Steering Committee for the State of Penang ("the committee") in respect of this policy not being a legal entity, has to function through the defendant who being a statutory body possesses legal capacity to sue and be sued.

It was further alleged by Encik Othman in his affidavit that (1) in pursuance of the objectives aforesaid, the defendant had through the State Authority, Penang, acquired the land upon publication of Gazette Notification No. 734 dated 13 October 1980 (2) on 11 March 1982, the defendant was notified by the Collector of Land Revenue Seberang Perai Utara ("the Collector") that it could enter the land and did so, (3) the land was accordingly alienated to the defendant having been allocated a new lot number being Lot PT 343 Section 4, Town of Butterworth, Daerah Seberang Perai Utara, Penang, (4) the defendant was accordingly desirous of developing the land by constructing 14 storey low cost flats comprising 462 units for residence and 32 units for shops (the project) for sale at RM25,000 per unit to members of the public especially those in the low income group including Bumiputra (5) the layout and the building plans for the project had been duly approved; (6) the defendant had thus discovered that there were 56 dwelling houses standing on the land which were occupied by 72 families including the plaintiffs; (7) as implementation of the project would necessitate the eviction of the occupants, including the plaintiffs, the defendant had, as early as 1983, commenced negotiations with the occupiers on an *ex gratia* basis and without admission of liability that in return for vacant possession the defendant would pay a sum of money and assist and be responsible for expenses and costs in resettling occupants including the plaintiffs; (8) on 14 July 1980, the Collector had submitted to the defendant a report making his recommendation as to the amount of *ex gratia* payments to be made to the occupiers of the land; (9) the payments recommended to the plaintiffs were as follows:

(a) to the first plaintiff who occupied two houses, RM6,100 and RM4,300, respectively,

(b) to the second plaintiff RM4,600,

(c) to the third plaintiff RM5,500,

(d) to the fourth plaintiff RM5,100, and

(e) to the fifth plaintiff RM5,600.

(10) On 12 February 1983, representatives of the defendant met with officials of Koperasi Serbaguna Bagan Dalam, the representatives of the occupiers of the land. At this meeting, the occupiers' representatives were informed (a) that to enable the project to be implemented, the occupiers would have to vacate and temporarily occupy a building to be constructed by the defendant but the plan of which had already been approved, (b) that *ex gratia* payments as recommended by the Collector would be made which would be used as deposits to enable the occupiers to purchase units of the low cost flats and shops to be built in accordance with the project and (11) the representatives of the occupiers accepted these proposals and the results of the meeting were duly minuted - see Ex. OMN7.

(12) Consequently, the defendant had by 29 December 1983 constructed temporary longhouses consisting of 72 units at a cost of RM695,200. And so, on 1 April 1984, 47 of the occupiers moved into the longhouses but the rest of the 25 occupiers continued to occupy the land.

(13) Subsequently, on 18 August 1984, four further meetings were held between the representatives of the rest of the 25 occupiers and the defendant at which the defendant made increased offers of *ex gratia* payments but these were declined.

(14) Later, on 20 October 1984, another meeting was held, and this time, representatives of the defendant made an offer of a further increase in *ex gratia* payments or in the alternative, the offer of other sites on State Land for resettlement. In the event of the alternative offer being accepted, then the occupants concerned could apply for alienation of the State Land in which case the defendant would lend its aid to such application.

(15) In the result, the remaining 25 applicants, including the plaintiffs, did apply for alienation of State Land and their applications were approved by the proper authority as appears from the letter dated 27 August 1986 from the Pengarah Tanah Dan Galian being Ex. OMN11. (Subsequently, Temporary Occupation Licences were issued to the plaintiffs in respect of State Land at Mak Mandin, Butterworth - see Bundle "A" to Supplementary Affidavit of Othman bin Mohd Noor affirmed to on 3 February 1988 encl. 16).

(16) Nevertheless, subsequent meetings were held between representatives of the rest of the 25 occupants and those of the District Office, Butterworth, ending with another meeting held on 19 April 1987, at which incidentally the plaintiffs were also present. At this last meeting the following final proposals were made on behalf of the defendant:

(a) the *ex gratia* offer of payment was increased by a further 10%.

(b) the occupants concerned were offered alternative sites for resettlement at s. 3, Seberang Perai Utara, Butterworth (Mak Mandin), temporary accommodation at longhouses and transport and other expenses.

(17) Of the rest of the 25 occupants, 20 accepted the above offers, leaving only the 5 plaintiffs who refused.

(18) By reason of s. 425(2) of the National Land Code 1965, ("the Code") it was said that the land was deemed State Land and having regard to the provisions of s. 66 of the Land Acquisition Act 1960, free from all encumbrances including those of any occupiers. Accordingly, it was further said that the plaintiffs were in unlawful occupation of State Land, an offence in contravention of s. 425 of the Code and had been served with notices in writing to quit, vacate and yield vacant possession but had failed to comply therewith.

(19) Finally, it was urged that hardship and irreparable injury would be occasioned to the defendant if the injunction were maintained having regard to the following matters:

(a) the existence of the plaintiffs' dwelling houses on the land would prevent earthworks from proceeding and hence lead to the stoppage of the project which was intended to benefit the less effluent section of the public by providing them with low cost homes;

(b) the substantial expenses already incurred by the defendant - a sum of RM695,200 in constructing the longhouses - and other expenses in connection with earthworks, roads and the preparation of the layout plan;

(c) the present estimate of the cost of the project was RM27,262,707.59 based on the comparatively low cost of materials now prevailing but should there be delay in the implementation thereof, it was apprehended that this could lead to increase in prices thus imposing an unfair strain on the resources of the defendant especially since it had not engaged in the project with a view to profit;

(d) any delay in the implementation of the project would be prejudicial to the 67 other occupiers of the land who had already moved into the temporary longhouses and who are waiting to purchase flats to be built pursuant thereto.

(20) In all the circumstances, it was said that the balance of convenience favoured the defendant.

I now turn to consider the affidavit in opposition affirmed to on 2 September 1987 by the fourth plaintiff on his own behalf and on behalf of the other plaintiffs.

Essentially, it was contended that the acquisition of the land by the State Authority was made in breach of the requirements of ss. 11, 12, 14 and 15 of the Land Acquisition Act 1960, and that therefore the subsequent alienation thereof to the defendant was void and of no effect. It was further contended that the plaintiffs were protected tenants within the Control of Rent Act 1966, and therefore not trespassers.

In the alternative, it was said that the *ex gratia* payments concerned were merely offered to the plaintiffs but never accepted and also that the balance of convenience favoured the plaintiffs.

I must now proceed to an examination of the issues which arise for decision.

The guiding principle which I kept in the forefront of my mind in considering the present application is to be found in the following passage of my judgment in *Saw Seng Kee v. Director of Lands and Mines, Penang & Ors.* [1987] 1 MLJ 80 at 81, that is to say:

> It is settled law that a Public Authority - and the Urban Development Authority is such a body - should not be restrained by interlocutory injunction from exercising its statutory powers unless the plaintiff has shown a real prospect of success in his claim for a permanent injunction at the final hearing.

Turning to the particular circumstances of this case, two things are clear.

In the first place, the plaintiffs' claims would appear to be barred by the provisions of s. 2 of the Limitation Act 1953, having regard to the time-table of events hereinbefore mentioned. In particular, the plaintiffs' cause of action would appear to have accrued on 13 October 1980, that being the date of publication in the Gazette of the proclamation of acquisition of the land, yet the plaintiffs did not issue their writ herein impugning the acquisition until 3 July 1987.

I hasten to add that I use the word "appears" advisedly as I do not, and cannot, decide the point at this stage of the proceedings. Nevertheless, the point is relevant in considering the question whether the plaintiffs have a real prospect of success at the final hearing.

In the second place, it was abundantly clear that damages in this case would afford an adequate remedy were the plaintiffs to succeed at the final hearing. The various negotiations for settlement by payment would appear to emphasise this point. In this connection, I need no more than refer to the following passage in the judgment of Lord Diplock in the oft quoted case of *American Cyanamid v. Ethicon* [1975] AC 396, at 408 B & C:

> ... the Court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage.

Other considerations which weighed with me when discharging the injunction was the balance of convenience which in my view clearly favoured the defendant rather than the plaintiffs. It would be tedious and unnecessary for me to recapitulate the various factors regarding this part of the case for, I trust, they have already been set out fully and clearly.

I must, however, make the observation that when considering the balance of convenience, the wider public interest may in some cases properly be regarded as decisive. Having regard to the several matters relevant to the question of hardship appearing in the affidavit of Encik Othman bin Mohd Noor, which I have hereinbefore summarised, the wider public interest cried out for the discharge of the injunction. I would conclude this particular point by citing the following passage in my judgment in *Saw Seng Kee's* case (*ibid*) at p. 82 col. 1, H and I:

> In considering the question of the balance of convenience, I thought I was entitled to, and did take into consideration, the public interest since Urban Authority is a public authority: (see *Smith & Ors. v. Inner London Education Authority* [1978] 1 All ER 411). The wider public interest may, in some cases, as it does in my opinion in this case, prove to be of decisive importance. See for example, the case of *Rousse Uclaf v. Seanlre & Co.* [1977] FSR 125, where the plaintiffs had alleged that a drug marketed by the defendants infringed the plaintiffs' patent, the defendants argued successfully that the drug had life-saving qualities and it was greatly in the public interest not to restrain the sale of such a drug at the interlocutory stage.

Finally, there was also non-disclosure on the part of the plaintiffs, of the various material facts appearing in the affidavits of Encik Othman bin Mohd Noor hereinbefore mentioned, when applying for the interlocutory injunction at the *ex parte* stage. It is trite law that when a plaintiff on an *ex parte* hearing has omitted, even as a result of a mere error of judgment, to make full disclosure of all material matters, the order must be discharged *inter partes* without investigating the merits: *Thermax v. Schott Industrial Glass* [1981] FSR 289.

Accordingly, the application to discharge the interlocutory injunction was granted and an enquiry as to damages before the Senior Assistant Registrar directed. Costs were to follow the event.

Also found at [1989] 2 CLJ 149